TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 169.

JOHN DOE, EX DEM. SIDNEY OAKSMITH, BENJAMIN H. CHEEVER, ANNIE J. CHEEVER, THOMAS HUGHES, AND ANNIE J. WORCESTER, PLAINTIFFS IN ERROR,

vs.

HORACE S. JOHNSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 2, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between John Doe on the demise of Sidney Oaksmith, Benjamin H. Cheever, Annie J. Cheever, Thomas Hughes, and Annie J. Worcester, as plaintiff, and Richard Roe, with notice to Horace S. Johnson, as defendant, No. 4151 at law, a manifest error hath happened, to the great damage of the said plaintiff as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, this 1st day of April, in the year of our Lord 1874, and of the Independence of the United States the 98th.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Horace S. Johnson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein John Doe on demise of Sidney Oaksmith, et al., is plaintiff, and Richard Roe, with notice to you, are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

(Indorsed:) Served a copy of the within citation on H. S. Johnson this 4th of April, 1874.

A. SHARP,
Marshal.

S'd April 4th, '74.

EDWARDS.

2 In the supreme court of the District of Columbia, the 1 day of April, 1874.

JOHN DOE ON THE DEMISE OF SIDNEY OAKSMITH, BENJAMIN H. CHEEVER, et al., *vs.* RICHARD ROE, WITH NOTICE TO HORACE S. JOHNSON.	At law—No. 4151. In error.

Know all men by these presents, that we, Duncan Archie Pell & Jas.

K. Pell, jr., are bound unto the above-named Horace S. Johnston in the sum of five hundred dollars, to be paid to the said Horace S. Johnston, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 1 day of April, 1874.

Whereas the above-named plaintiff hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named plaintiff shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

D. ARCHIE PELL. [SEAL.]
JAMES K. PELL, JR. [SEAL.]

Sealed and delivered in presence of—
E. H. STRATTON.

Approved this 1st Apl., 1873.

D. K. CARTTER,
Chief-Justice.

(Endorsed:) Filed April 1, 1874. R. J. Meigs, clerk.

3 The answer of the chief-justice and justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following:

4 The answer of the chief-justice and justices of the supreme court of the District of Columbia to the foregoing writ of error.

Declaration.

Declaration.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Richard Roe, late of the county aforesaid, was attached to answer unto John Doe, in a plea wherefore with force and arms, &c., at the county aforesaid, he entered unto all that piece of ground in the county aforesaid, known and described as the south half of lot fourteen, in reservation B, in the city of Washington; and the north seven feet six inches of lot thirteen in said res'n, more particularly known as number 498 Sixth street west, having a front of twenty-two feet six inches, and extending back, of the same width, one hundred feet to an alley,
5 being the same ground occupied by a warehouse or brick building between the dwelling-house of——Austin and the gun-shop of Munck, which Sidney Oaksmith had demised to the said John Doe for a term of years which is not yet expired; and also, wherefore, with force and arms, &c., at the county aforesaid, he, the said Richard, entered into a certain other piece of ground, being one undivided half part of the south-half of lot 14, and the north 7 feet 6 inches of lot thirteen, in reservation B, in Washington City, which Benj'n H. Cheever & Anne J. Cheever had demised to the said John Doe, for a term of years which

is not yet expired; and also into a certain other undivided part of said premises which Thomas Hughes had demised to the said John Doe, for a term of years which is not yet expired; and also, into another undivided half part of said premises, which Annie J. Worcester had demised to the said John Doe, for a term of years which is not yet expired, and him, the said John Doe, ejected from the said several pieces of
6 ground, and other wrongs to him then and there did, to the great damage of him, the said John Doe, and against the peace, government, and dignity of the United States.

And whereupon the said John Doe, by Walter S. Cox, his attorney, complains that the said Sidney Oaksmith, heretofore, to wit, on the first day of July, in the year of our Lord eighteen hundred and sixty-seven, at the county aforesaid, had demised to the said John Doe the said piece of ground described as the south half of lot fourteen, and the north 7 feet 6 inches of lot thirteen, in reservation B, in the city of Washington, to have and to hold to him, the said John Doe, and his assigns from the said first day of July, in the year of our Lord eighteen hundred and sixty-seven, for and during and unto the full end and term of five years from thence next ensuing, fully to be complete and ended; and that the said Benjamin H. Cheever and Anne J. Cheever, heretofore, to wit, on said first day of July, A. D. 1867, at the county aforesaid, had demised to the said John Doe one undivided half
7 part of said part of lots known as south half of lot 14, and north 7 feet 6 inches of lot thirteen, in reservation B, in Washington City, to have and to hold to him, the said John Doe, and his assigns for and during and unto the full end and term of five years from thence next ensuing, fully to be complete and ended; and that the said Thomas Hughes, heretofore, to wit, on said first day of July, A. D. 1867, at the county aforesaid, had demised to the said John Doe one undivided half part of said premises, to have and to hold to him, the said John Doe, and his assigns for and during and unto the full end and term of five years from thence next ensuing, fully to be complete and ended; and that the said Annie J. Worcester, heretofore, to wit, on said first day of July, A. D. 1867, at the county aforesaid, had demised to the said John Doe one other undivided half part of said lot of ground, to have and to hold to him, the said John Doe, and his assigns for and
8 during and unto the full end and term of five years from thence next ensuing, fully to be complete and ended; by virtue of which said several demises the said John Doe entered into the said several pieces of ground, with the appurtenances, and was possessed thereof, and being so thereof possessed the said Richard Roe afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, entered into the said several pieces of land with the appurtenances which the said Sidney Oaksmith, Benj'n H. Cheever, & Annie J. Cheever, Thomas Hughes, and Annie J. Worcester, had respectively demised to the said John Doe, in manner aforesaid, for the terms aforesaid, which terms have not yet expired, and ejected him, the said John Doe, from his said terms, and other wrongs to him then and there did, against the peace, Government, and dignity of the United States. Wherefore he saith he hath sustained damage to the value of fifty dollars; and therefore he brings suit.

WALTER S. COX,
Attorney for Plaintiff.

9 SIR: I am informed that you are in possession of or claim title to the premises in this declaration mentioned, or some part

thereof; and I being sued in this action as a casual ejector merely, and having no claim or title to the said premises or any part thereof, do advise you to appear in the supreme court of the District of Columbia for the county of Washington, on the first Tuesday of November, at the November term of said court, by some attorney of said court, and then and there by rule of the same court cause yourself to be made defendant in my stead. Otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

I am, very respectfully,

RICHARD ROE.

To HORACE S. JOHNSON,
Tenant in possession of the above premises or some part thereof.

(Endorsed:) Filed 18th Sept., 1867.

10 *Summons.*

In the supreme court of the District of Columbia, the 18th day of Sep., 1867.

DOE, DEM. SIDNEY OAKSMITH, ET AL., plaintiff,
vs.
HORACE S. JOHNSON, DEFENDANT. } At law, No. 4151.

The President of the United States to the marshal for said District, greeting:

Summon the defendant in the above-entitled case to appear in said court on or before the first special term thereof occurring twenty days after service of this writ, and answer the declaration herewith served, and warn him that, on default of so doing, the plaintiff may proceed to judgment and execution at the trial term of said court next after said service. And do you return this writ into the clerk's office immediately after service so endorsed as to show the time and manner of executing it; and, if you cannot serve it within six months, the day of its issuance exclusive, then return it into said office for renewal.

Witness: D. K. Cartter, chief-justice of said court.

11 R. J. MEIGS, *Clerk.*

W. S. COX.

NOTE.—That the special terms of the court commence on the first Tuesday of every month except May, in which month they commence on the third Monday, and August, in which month there is no term of the court; and that the trial terms of the court commence on the first Tuesday of February, third Monday of May, and first Tuesday of November, when final judgments may be taken and execution awarded.

(Endorsed:) Served copy of sum's & declaration on deft.

D. S. GOODING, *Marshal.*

SEPT. 21, '67.

Plea.

DOE, DEM. OAKSMITH
vs.
H. S. JOHNSTON. } Plea. 4151. At law.

The clerk will enter the plea of not guilty, & issue thereupon,
12 & set the case on the calendar for the present term.

W. S. COX,
Atty for. Plff.
JOS. H. BRADLEY, JR.,
Atty. for Deft.

(Endorsed:) Plea. Entered 4 M., 123.

Orders in circuit court.

Orders in circuit court.

WEDNESDAY, *February* 5, 1868.

Session resumed pursuant to adjournment. Justice Wylie presiding.

SIDNEY OAKSMITH'S LESSEE, PLF.,
vs.
HORACE S. JOHNSHON, DEFT. } At law. No. 4151. Cal. 395.

The defendant, by his attorney, Mr. Bradley, comes and pleads not guilty, and confesses lease, entry, and ouster, and agrees upon the trial, to rely upon the title only; and by consent of the parties, by their attorneys, Mr. Cox for plaintiff, this case is placed upon the trial calendar of the present term.

13 WEDNESDAY, *June* 14, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

SIDNEY OAKSMITH'S LESSEE, PLFF.,
vs.
HORACE S. JOHNSON, DEFT. } At law. No. 4151. Cal. 31.

And now comes as well the plaintiff, by his attorneys, Messrs. Meloy & Landers, as the defendant, by his attorneys, Messrs. Bradley & Merrick, and a jury of good and lawful men of this District, to wit: Thomas Orme, Alexander H. Paul, Alexander Shaw, John N. Trook, Decius W. Edmonston, George D. Taff, Basil M. Burroughs, William H. Wheeler, Walter A. Nicholson, William R. Fowler, Columbus S. Alexander, and Stephen A. Douglas, who being sworn to try the issue above joined, are respited till the meeting of the court to-morrow.

14 THURSDAY, *June* 15, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

SIDNEY OAKSMITH'S LESSEE, PLFF.,
vs.
HORACE S. JOHNSON, DEFT. } At law, No. 4151. Cal. 31.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, and thereupon on motion of

the plaintiff, leave is granted him to amend his declaration, by substituting six inches in place of five inches, and the declaration is amended accordingly, and the jury are again respited until the meeting of the court to-morrow.

FRIDAY, *June* 16*th*, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

SIDNEY OAKSMITH'S LESSEE, PLFF., *vs.* HORACE S. JOHNSON, DEFT. } At law, No. 4151. Cal. 31.

15 And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow.

SATURDAY, *June* 17*th*, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

SIDNEY OAKSMITH'S LESSEE, PLFF., *vs.* HORACE S. JOHNSON, DEFT. } At law, No. 4151. Cal. 31.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court on Monday next.

MONDAY, *June* 19*th*, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding.

SIDNEY OAKSMITH'S LESSEE, PLFF., *vs.* HORACE S. JOHNSON, DEFT. } At law, No. 4151. Cal. 31.

16 And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited Saturday, who, after the case is given them in charge, on their oath, say that as to the seven feet six inches of lot thirteen described in the declaration, they find for the plaintiff, and as to the south half of lot fourteen for the defendant. Therefore it is considered that the plaintiff recover against the defendant the north seven feet and six inches of lot thirteen, in reservation B, in the city of Washington, District of Columbia, and $ costs of suit, and have execution thereof.

Motion for new trial.

In the supreme court, D. C.

EX DEM. OAKSMITH *vs.* HORACE S. JOHNSON. } Law, No. 4151.

And now comes the plaintiff in the action above entitled, and moves the court for a new trial therein, for error of law by the justice presiding in his rulings during the trial, and in his instructions to the jury,
17 as will fully appear by reference to the bill of exceptions prayed and taken at the trial.

WM. A. MELOY,
For Plff.

(Endorsed :) Filed June 23, '71.

FRIDAY, *June 23rd*, 1871.

Session resumed pursuant to adjournment. Wylie, justice, presiding,

SIDNEY OAKSMITH'S LESSEE, PLFF., *vs.* HORACE S. JOHNSON, DEFT. } At law, No. 4151. Cal. 31.

And now again comes the plaintiff, by his said attorney, and moves the court for a new trial, for errors of law by the justice presiding, in his rulings during the trial, and in his instructions to the jury, as will fully appear by reference to the bills of exceptions prayed and taken at the trial.

18 *Bill of exceptions.*

In the supreme court, District of Columbia.

EX. DEM. OAKSMITH *vs.* HORACE S. JOHNSTON. } Bill of exceptions. At law. No. 4151.

On the trial of this action, the plaintiff, to maintain the issues on his part joined, gave evidence tending to prove that one Thomas Hughes occupied and used the premises described in the declaration herein, as early as the year 1828, and continued in the exclusive occupancy and use of them from that time until about the year 1836, personally, when he removed to a farm distant about two miles, and rented said premises, only occasionally using them personally, up to the time of his death in April, 1837.

That during this period there was upon said premises a stable enclosing them upon the east or rear end, along the line of the public alley, and that said premises were for the rest enclosed on the north side by the brick warehouse of two stories, the property of said Hughes, now remaining and known as No. 111 Sixth street N. W., having a
19 front of 22 feet 6 inches on Sixth street aforesaid; on the south side by the brick building still standing and then known as the Van Coble or Jim Long house, from the line of Sixth street east part way to the alley aforesaid, and from the wall of that house to said rear line by a close board fence; and on the west or front end by a board fence with gates extending from the said warehouse to the said Van Coble house a distance of 22 feet six inches. That the space thus enclosed was used by said Hughes and by his tenants for stable purposes, and as a place for storage, and that the front gates were kept locked.

That, in April, 1837, said Hughes made his valid will devising to his daughter Anna, only represented in this action by the plff., all his interest and estate in the premises aforesaid, absolutely; and thereupon died, still being in the use, occupancy, and possession aforesaid.

That after the death of said Thomas Hughes the said devisee personally, or by her tenants and legal representatives, continued in the open, notorious, and exclusive occupancy and possession of said premises, and every part thereof, claiming to be the owner thereof, and
20 recieving the rents and profits of the same, until January, 1867, and that said devisee in the year 1849 erected the present two-story brick building, known as No. 109 Sixth street N. W., covering the entire premises aforesaid with a front of 22 feet 6 inches and a depth of 100 feet.

That said premises consisted of the south half of lot No. 14, in square B, having a front width of 15 feet, and the north part of the lot 13, in said square, having a front of 7 feet 6 inches, and that the entire premises were in the possession of the defendant at the time of the commencement of this action. And thereupon the plff. rested his case.

And the defendant, to maintain the issues on his part joined in said action, gave evidence tending to prove that in the year 1832 or 1833, one Henry T. Weightman gave the aforesaid Thomas Hughes permission to occupy the premises in controversy as the tenant of him, the said Henry.

That on the 18th of Sept., 1822, the board of commissioners of
21 low grounds, appointed under an ordinance of the city of Washington, of the 22nd day of May, 1822, passed in pursuance of, and to carry out, the act of Congress of the 7th of May, 1822, entitled "An act," &c., sold the said south half of lot 14, in square B, to Henry T. Weightman, and delivered to him a bond for the conveyance thereof to him, his heirs, and assigns, by the mayor of said city, pursuant to the act aforesaid, upon full payment of the purchase-money; that such purchase-money had been fully paid by 5th of June, in the year 1830; that said Henry died at the city of Washington in 1853, and that in the year 1866, Roger C. Weightman was his only surviving heir. That on the 15th day of Oct., 1866, the mayor of the city of Washington executed and delivered a deed of said south half of lot 14 to said Roger, as vested with the interest and estate therein acquired by Henry aforesaid, under the sale aforesaid, of the 18 day of Sept., 1822.

22 That on the day of October, 1866, the said Roger C. Weightman executed and delivered a deed of said south half of lot 14 to the defendant in this action. And thereupon the defendant rested.

And the plff., to rebut the defence made by said defendant and further to maintain the issues on his part joined, then gave evidence tending to prove that the purchase aforesaid by the said Henry of said south half of lot 14, in 1822, was in trust for said Roger; that as early as the year 1830 said Roger was the assignee of said Henry of his bond of conveyance aforesaid, and had paid the purchase-money thereof; that on the 5th day of June, 1830, the mayor of Washington, pursuant to the act of Congress of the 22d of May, 1822, before mentioned, duly conveyed to said Roger all of lot 13 in square B, aforesaid, and that on the 13th day of March, 1837, said Roger duly conveyed to said Thomas Hughes the north 7 feet 6 inches of said lot 13, being the southern portion of the premises described in the declaration, and in controversy in this action.

23 And the plaintiff further gave evidence tending to prove that the aforesaid bond for the conveyance of said south half of lot 14 had been lost, and that the aforesaid deed of Oct. 15th, 1866, from the mayor of the city of Washington to said Roger was procured by the said defendant and said Roger on their statement that such bond had been lost, and that all the interest of said purchaser, Henry, therein had become vested in said Roger by transfer, and that said Roger now is and since 1801 has been resident of Washington. And all the evidence on both sides having been closed, to wit, the evidence above in full recited, the plaintiff prayed the court to instruct the jury as follows:

1st. There is evidence in the cause from which it is competent for the jury to find that the purchase of 1822 by Henry T. Weightman was in trust for his brother, Roger C. Weightman, or that the said bond for conveyance of the south half of lot 14 to Henry T. Weightman and his

assigns was by said Henry duly assigned to said Roger at some time prior to March, 1837, and if the jury find from all the evidence
24 in the cause that such purchase was so in trust for said Roger, or that the bond for the conveyance of such portion of the premises in controversy was duly assigned to said Roger prior to March, 1837, then, from all the evidence in the cause it is further competent for the jury to find that such bond of conveyance was duly assigned to said Thomas Hughes prior to his death, and that the mayor of the city of Washington has duly conveyed the said south half of lot 14 to the said Thomas Hughes during his lifetime, or since his death to his devisee, in which case, or either of them, the plaintiff is entitled to recover said south half of lot fourteen, square B.

2nd. If the jury find from the evidence that Thomas Hughes from some period prior to his death in April, 1837, was personally, or by his tenants, in the actual occupancy and seized of the premises described in the declaration, and so continued to the time of his death, and that since his death up to January, 1867, his devisee and her trustees have continued in such occupancy and seisin, then the deed of Oct., 1866, from Roger C. Weightman to the defendant was void, and
25 conveyed no title.

3d. If the jury are satisfied from all the evidence that the purchase of the premises in controversy by Henry T. Weightman in 1822, at a sale made by the board of commissioners of low grounds pursuant to the act of Congress of May 22nd, 1822, of which board Roger C. Weightman, his brother, was then a member, was in trust for said Roger, or that said Henry's certificates of purchase, or bonds for the conveyance of the same to him, the said Henry, or to his assigns, were afterward transferred by him to said Roger, and that said Roger, in 1830, sought to obtain the deed of the south half of lot 14, in square B, (a part of the premises in question,) in connection with the contiguous lot, No. 13, in square B, from the mayor of the city of Washington pursuant to the act of Congress aforesaid, and failed to obtain such deed at that time only because there had not then been erected on said south half of lot 14 a building having a front of not less than 18 feet, and
26 that in March, 1837, said Roger sold and conveyed to Thomas Hughes a distinct portion of the premises in controversy, of which he, the said Roger, had already obtained the deed of conveyance, to wit, the north seven feet six inches of lot 13, in square B, adjoining said south half of lot 14, having a breadth of fifteen feet, and by said south half of lot 14 only separated from the premises already owned by said Thomas Hughes, then and still occupied by a two-story brick building having a front of twenty-two feet six inches, these are facts from which it is competent for the jury to infer that then, or at some previous time, said Thomas had obtained the due assignment of the certificate or bond for conveyance aforesaid of said south half of lot 14; and if from all the evidence the jury further find such fact, and that the notes for the purchase of said south half of lot 14 were fully paid prior to the 5th of June, 1830, and that said Thomas Hughes
27 was in possession and seised of said premises at the time of his death, and by his will devised the same to the plaintiff's cestui que trust, and that said devisee continued such possession and seizin more than 20 years up to the time when the def'd't got possession, and in the year 1849 erected thereon the present two-story brick building, covering the entire premises in controversy, twenty-two feet six inches by one hundred feet, the jury may presume a grant of said south half

of lot 14 by the mayor aforesaid, pursuant to the act aforesaid, to those under whom the plaintiff claims.

4th. If the jury believe, from the evidence, that the plaintiff and those under whom he claims have been, for more than twenty years prior to the entry of the defendant, in the exclusive, uninterrupted, and open possession of the premises in controversy, claiming to be the owners thereof, and that such possession was by enclosures, then the plaintiff is entitled to a verdict.

5th. If the jury find, from the evidence, that Thomas Hughes went
28 into possession by permission of Henry Weightman, and afterward, by his will, in 1837 devised the premises in controversy, and that his devisee, under such will, continued in possession for more than twenty years after his death and prior to the entry of the defendant, claiming to be the owners thereof, such devise terminated any holding by permission, and the possession by his devisee was adverse, and such a possession as entitled the plaintiff to recover.

6th. If the jury believe, from the evidence, that the south half of lot fourteen, square B, a part of the premises in controversy, was sold in 1822 to Henry Weightman, pursuant to the act of Congress of May 22nd, 1822, and that the purchase-money was paid in 1830, and that Thomas Hughes, by himself or his tenants, was in possession of those premises for several years prior to his death in 1837, and that his devisee, under his will, has, by herself, her representatives, or tenants, remained in possession thereof until the entry of the defendant in 1867, said Thomas and his devisee, claiming to be the owners thereof
29 during such possession, then the jury may presume a grant to the purchaser at said sale, or to his assignee, and also a conveyance from such purchaser or his assignee to those under whom the plaintiff claims.

Which instructions, or any, or either of them the court refused to give as prayed, and to such refusal, and to each and every refusal aforesaid the plaintiff excepts, and prays the court to sign, seal, and cause to be enrolled this first bill of exceptions, which is accordingly done the 19th day of June, 1871.

ANDREW WYLIE. [SEAL.]

30 (Endorsed:) 4151. At law. Sup. court, D. C. Ex-dem. Oaksmith v. Horace S. Johnson. Bill of exceptions. Filed July 29, '71.

31 *Orders of the court in the general term.*

WEDNESDAY, *November 1st*, 1871.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, and Humphreys.

JOHN DOE, LESSEE OF SIDNEY OAKSMITH, Benjamin H. Cheever & Annie J. Cheever, Thomas Hughes, & Annie J. Worcester, plff.,
vs.
RICHARD ROE, WITH NOTICE TO HORACE S. Johnson, defendant.
} At law. No. 4151.

Argued by Mr. Meloy, of counsel for the lessors of the plaintiff.

FRIDAY, *November 3rd*, 1871.

Session resumed pursuant to adjournment. Present, Chief-Justice Carter and Justices Olin, Wylie, and Humphreys.

JOHN DOE, LESSEE OF SIDNEY OAKSMITH, & others, plff.,
vs.
RICHARD ROE, WITH NOTICE TO HORACE S. Johnson, defendant. } At law. No. 4151.

Argument continued and concluded by Mr. Lander, for the lessors of the plaintiff.

32 SATURDAY, *December* 2, 1871.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, and Humphreys, & McArthur.

JOHN DOE, LESSEE OF SIDNEY OAKSMITH, and others
vs.
RICHARD ROE, WITH NOTICE TO HORACE S. Johnson, deft. } At law. No. 4151.

It is ordered that this cause be reheard at the next term.

TUESDAY, *April 23rd*, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

JOHN DOE, LESSEE OF SIDNEY OAKSMITH, & others, plff.,
vs.
RICHARD ROE, WITH NOTICE TO HORACE S. Johnson, deft. } At law. No. 4151.

Argued by Meloy for the plaintiff, and Merrick for defendant.

WEDNESDAY, *April* 24, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

JOHN DOE, LESSEE OF SIDNEY OAKSMITH, Benjamin H. Cheever and Annie J.
33 Chever, Thomas Hughes, and Annie J. Worcester, plff.,
vs.
RICHARD ROE, WITH NOTICE TO HORACE S. Johnson, deft. } At law. No. 4151.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and because it seems to the court here that, in the record and proceedings of the circuit court, and in the judgment thereof, as to the seven feet six inches of lot thirteen, described in the declaration, there is no error, it is considered that the said judgment be, and the same is hereby, in all things affirmed; and because it further

appears to the court that as to the south half of lot fourteen, described in the declaration, and as to which the jury found for the defendant, but no judgment was entered upon said finding, it is now here considered by this court that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defence; and further, that the plaintiff have execution of his aforesaid recovery.

TUESDAY, *May* 14, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter & Justices Olin & Humphreys.

34 DOE EX DEM. OAKSMITH ET AL.
vs.
HORACE S. JOHNSON. } At law. No. 4151.

And now comes the plaintiff and moves the court to correct the entry of judgment herein made by striking out the allowance of cost as therein made in favor of the defendant, and by causing such judgment to conform to the verdict in said action rendered, and to the decision of the court in general term overruling the motion for a new trial upon the bill of exceptions filed, or to direct the clerk to enter the judgment of the court substantially in the form and to the effect following, that is to say, "and now again comes here as well the said plaintiff as the said defendant, by their respective attornies, and the plaintiff moves this court to grant a new trial for error appearing in the bill of exceptions hereinbefore duly settled, signed, sealed, and enrolled; and because it seems to the court here that in the record and proceedings of the circuit court there is no error, the said motion is denied." Or, if the court be of opinion that the judgment entered in the court below could not properly have been entered during the pendency of the motion for a
35 new trial, then that the judgment of the general term be entered in the same manner, and also as follows: "And it is, therefore, now here considered and adjudged that the plaintiff recover against the said defendant, according to the verdict of the jury, herein rendered, possession of all that part of the premises described in the declaration, distinguished as the north part of lot thirteen in square B, according to the plan of the city of Washington, having a width of seven feet six inches, and also the sum of $ now here adjudged of increase to the said plaintiff for his costs and expences in and about the said action by him expended, and have execution accordingly; and as to the residue of the premises in the said declaration mentioned, whereof the said defendant is acquitted by the verdict of the jury aforesaid, that said plaintiff take nothing by his suit, and said defendant go thereof without day.

WILLIAM A. MELOY,
Atty. for Plff.

SATURDAY, *May* 18, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Wylie and Humphreys.

36 DOE ON THE DEMISE OF OAKSMITH & others, plff.,
vs.
HORACE S. JOHNSON, DEFENDANT. } At law. No. 4151.

And now again comes here as well the plaintiff as the defendant, by

their respective attorneys, and therefore it is ordered that the words, "And recover against the plaintiff the costs of his defence," in the judgment of this court, be stricken out and stand for nothing.

Certificate.

Clerk's office of the supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the foregoing writings are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of the said court this 9th day of April, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Asst. Clerk.

(Indorsement on cover:) No. 169. John Doe ex dem. Sidney Oaksmith, Benjamin H. Cheever, Annie J. Cheever, Thomas Hughes, & Annie J. Worcester, plaintiffs in error, vs. Horace S. Johnson. District of Columbia sup. ct. Filed 2d May, 1874.

REC. 169—3

Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN DOE, *ex dem.*, SIDNEY OAKSMITH, *et al.*,
Plaintiffs in Error.

vs.

HORACE S. JOHNSTON, Defendant in Error.

No. 169.

ABSTRACT OF CASE.

This case comes before the court on a writ of error from the Supreme Court of the District of Columbia.

On the 18th day of September, 1867, the plaintiffs filed their declaration in ejectment against the defendant to recover from him possession of the premises known as No. 498 Sixth street northwest, in the city of Washington, the same being a brick warehouse, having a breadth of twenty-two feet six inches, with a depth of one hundred feet, and covering the north seven feet six inches of lot thirteen, and the south fifteen feet of lot fourteen in square B.

On the 5th day of February, 1868, the defendant appeared on notice of Richard Roe, confessed lease, entry, and ouster, and plead not guilty; whereupon issue was joined.

At the May term of the court, June 14, 1871, the cause came on to trial before a jury.

The plaintiff proved that one Thos. Hughes was in the exclusive occupancy and possession of the premises at the time of his death in April, 1837. (Record, f. 19.) By his will, duly executed as a will of real estate a few days before his death, he duly devised the property absolutely to his

daughter Anna, of whose estate the aforesaid Sidney Oaksmith is the trustee. Upon the death of her father the said devisee, Anna, obtained possession of the property, and either personally or by her tenants and legal representatives continued from that date in the open, notorious, and exclusive possession, claiming to be the owner and receiving the rents and profits until January, 1867. In the year 1849 the said devisee erected on the premises the brick building now still standing thereon, and covering the entire property. (Record, f. 20.) The plaintiff further gave in evidence facts tending to prove that Hughes at the time of his death held the two parcels of the property without distinction, in similar manner, and by like tenure and estate. (Record, f. 19.)

The defendant then gave evidence tending to prove that the property was formerly the property of the United States; that pursuant to the act of Congress of May 7th, 1822, chap. XCVI, (3 Stat. 691,) and of an ordinance of the city of Washington, of May 22d, 1822, passed in pursuance, and acceptance of said act, the property was sold to Henry T. Weightman, and that there was then delivered to him a bond for the conveyance thereof, upon payment of the purchase money; that the same had been fully paid as early as June 5th, 1830; (Record, f. 21;) that in the year 1853 Henry died, being a resident of the city of Washington, D. C.; that in 1866 Roger C. Weightman was his only surviving heir; that on the 15th day of October, 1866, the mayor of Washington executed and delivered a deed of the south half of lot 14, square B, to Roger, who on the day of October, 1866, executed a deed of the same to the defendant, and thereupon the defendant rested his case.

The plaintiff, in rebuttal, then gave evidence tending to prove that the original purchase by Henry T. Weightman was in trust for Roger C. Weightman. (Record, f. 22.) That Roger subsequently took an assignment of the bond for the conveyance, and paid the purchase money as early as in 1830; (Record, f. 22;) that in June, 1830, Roger

obtained deed of the whole of lot 13, in square B, adjoining lot 14 on the south; that as early as 1837 the south 22 feet 6 inches of this lot 13 was occupied by the brick dwelling of Van Coble, still standing; that the north half of said lot 14, and the whole of lot 15, having together the same breadth of frontage, were owned by the aforesaid Thomas Hughes, and were covered by his brick warehouse, also still standing; that the intervening space, to wit, the premises in controversy, had a like breadth of 22 feet 6 inches, and at the time of the death of Hughes was in his actual possession and occupancy, (Record, f.19;) that on the 13th day of March, 1837, Roger gave Hughes a deed in fee of his remaining strip of lot 13, the south 7 feet 6 inches of said intervening space. (Record, f. 22.)

The plaintiff further gave evidence tending to prove that the aforesaid deed of October 15, 1866, from the mayor of Washington to said Roger, was procured by the defendant himself jointly with said Roger on their statement that the bond for conveyance had been lost, and that all the interest of the purchaser Henry had been vested in Roger by transfer. (Record, f. 23.)

The plaintiff also proved that Rogers had been a resident of the city of Washington during all the time since 1801, and thereupon the evidence on both sides was closed.

The plaintiff then asked the court for several instructions each of which severally having been refused, and exceptions thereon taken, the jury, under such direction of the court, gave their verdict for the defendant as to part of the premises, viz, the south half of lot 14, square B.

On appeal, the Court in General Term sustained the rulings of the Court at Circuit Term, and the correctness of those several rulings is the question here presented.

Assignment of Errors.

When pruned of some immaterial superfluities, the substance of the first prayer is:

If, from all the evidence the jury find that the purchase by Henry T. Weightman, in 1822, was in trust for Roger

C. Weightman, or so find that the bond for conveyance was assigned to Roger before March, 1837, then, from all the evidence, it is further competent for the jury to presume that such bond had been duly assigned to Thomas Hughes before his death, and that the premises in question had been duly conveyed to his devisee.

The refusal to give this instruction to the jury constitutes the *first error* relied upon.

The second prayer was to the effect that the deed of Roger to the defendant, in 1866, was void for *champerty* under the statute, (32 Henry VIII, c. 9,) and its refusal constitutes the *second error* relied upon.

The refusal of the fourth prayer was practically a refusal to charge the jury that, under all the evidence given, the plaintiff could not avail himself of *the statute of limitations* as a muniment of title, even though the jury found from that evidence that the plaintiff had for more than twenty years prior to the entry of the defendant been in the exclusive, uninterrupted, open, and notorious possession of the premises, by enclosures, claiming to be the absolute owner.

This constitutes the *third error* relied on.

—The sixth prayer presents the question whether the jury may not *presume a grant from the State*, when strong facts and circumstances evince an equitable right—an incipient title from the State—such as an actual sale and the full payment of the purchase money; long possession in conformity thereto; besides mesne conveyances and wills transmitting the right from the purchaser to the plaintiff.

The refusal of the sixth prayer constitutes the fourth error relied upon.

Brief of Argument.

I

The first and fourth errors stated depend almost entirely upon the same propositions of law, and may as well be considered together. The court was prayed to instruct the

jury that, from all the evidence in the case they were *at liberty*—

1st. To presume a transfer of the bond for a conveyance of the south half of lot 14 by Roger C. Weightman to Thomas Hughes.

2d. To presume a grant or conveyance of the same property by the mayor of the city of Washington to the holder of the bond.

But the learned judge at the trial held that a grant of land from the State must be proven by showing the instrument itself; that it could not under any circumstances be presumed, and until the grant was thus shown, nothing availed.

We maintain the contrary of these; and first, that a grant from the State may be presumed.

This is entirely aside from all questions touching the applicability of the statute of limitations. The statute as the basis of title is of legislative creation; but the doctrines of the presumption of a grant grow out of the universal and immutable laws of reason, alike applicable in the nature of things to the transactions of subjects and of sovereign, of private individuals and of States.

cf. Mathews on Presumptive Ev., pp. 5, 6, ~~186, 188,~~ (~~n 1, 283.~~) 204

Greenleaf's Cruise on Real Prop., tit. XXXI, chap. 1, § 10, n. 1, and § 11.

Greenleaf's Ev., vol. 1, sec. 45.

McHenry on Eject., p. 151.

While courts have uniformly declared the sovereign power free from the application of statutes of limitation, unless it was expressly made by the sovereign's own will and voice, yet they have with equal uniformity always and everywhere declared the sovereign amenable to the deductions of right reason.

This is the clear voice of the English courts, (see cases referred to in the foregoing citations, and in Best on Presumptions, pp. ~~4~~ and 107; also 11 East, 280 and 488; Til's. Adams on Eject, 78;) also of those of the United States.

+ § 301 318

(See Abbott's Nat. Dig., vol. 2, p. 308, sec. 220 *et seq.*, and cases there cited.) Also

Crooker *v.* Pendleton, 23 Maine, 339.
Mather *v.* Ministers of Trin. Ch., 3 Serg. and Rawl., 509.
McDonald *v.* McCall, 10 J., 377.

Nor has the rule ever been otherwise in the Province or the State of Maryland.

Young *v.* Hawkins, 1 H. and McH., 148.
2 H. and J., 125.
Coochey *v.* Smith, 3 H. and J., 20 and 26.
Mendell *v.* Clerklee, 3 H. and J., 468.
~~Plummer *v.* Lane, 4 H. and McH., 72.~~
~~11 Gill and J., 358.~~
Mitchell *v.* Mitchell, 1 Md., 44.

Nor does it matter that more than one conveyance must be presumed before the chain of legal title be completed. See McDonald *v.* McCall, *supra*, and citations.

It is then competent in the District of Columbia for a jury to presume a grant from the State, when, in the language of Lord Kenyon, *such grant might have legally been made;* or, in the language of the Maryland court, *when the initiation of the title has been affirmatively shown.* Only one practical question remains. If the jury on the trial of this action had been permitted by the court to consider the question of a presumption of a grant, (that is to say, whether, in view of all the evidence they could or could not reasonably believe that some mayor of Washington had, as bound by the terms of the sale, given a deed of the property, which had been since lost,) and had thereupon found that the title of the United States had been duly conveyed to the plaintiff, or his privies in estate and in possession of the property, could this verdict have been set aside as against the weight of evidence? If, under permission of the court to consider this question, the jury had so found, and that finding could not have been set aside as

contrary to the evidence, then clearly it was the duty of the court to have instructed the jury as prayed by the plaintiff, and submitted to them the question of presumption of a grant.

Had the evidence but faintly pointed to the presumption of a grant, still the question belonged to the jury, and should have been submitted to them.

Oftentimes the law requires a grant to be presumed, even though the reason of the jury and the court be persuaded that while it ought to have been made yet no grant had been actually made.

Carroll *v.* Norwood, 4 H. and McH., 288.
Casey *v.* Inloes, 1 Gill, 503.
Cowper p. 102.
1 Phil. on Ev., pp. 609–673.

In the case at bar, the court was not asked to instruct the jury that from the fact that the initiation of title had been affirmatively shown by proof the purchase, of the full payment of the purchase money, of subsequent continued possession of the property from 1830 to 1866, with the erection of costly improvements thereon, they must presume that some mayor, at some time during the period of that possession, had executed a deed to the person then seized, and holding the bond for the conveyance. He was only asked to instruct the jury, that under all the proofs in the case they were *at liberty* to consider if this were not so, and find according as the proofs preponderated in their judgment.

We claim, moreover, that a grant presumed is in everything the equivalent of an instrument of grant formally produced in court. A grant, in the meaning of the law, is an act; the intangible transfer, of which the presumption found, and the written instrument produced, are but modes of proof. The grant presumed is therefore an actual grant, and there is no real antagonism between our position and the rule of Maryland law which said that the title must first be shown out of the State by actual grant before title

by adverse possession could be made, or the statute of limitations availed of.

The production in court of a conveyance by the mayor to Roger C. Weightman in 1866 did not affect our right to have this question submitted to the jury.

If, in the absence of its production, the jury had found an earlier grant by presumption; if, in fact, the lost grant —the grant whose existence we have sought to ascertain by estimate of reason and of human probabilities—were to be exhumed, who would set any value or validity upon the second instrument? It would be mere paper. At the utmost, then, its production is merely evidence tending to rebut the presumption of a former conveyance.

Even that may well be questioned when we consider that had the mayor, in 1838, executed and delivered to the plaintiff a deed of the property, still the law required no record to be made of the transaction, while any one of a hundred supposable accidents might have hidden or destroyed both the bond for conveyance and the deed, and left the young heiress of Thomas Hughes with no muniment of title save the possession which she maintained from the day of her father's death, thirty years uninterruptedly, until in 1867 this defendant crept in.

But if it were in the least degree evidence competent in rebuttal of the presumption of a former grant, still, our prayer did not seek to exclude it from the jury, but asked only that the jury might pass on that with all the other proofs.

We do not claim title against the United States—neither by adverse possession,—nor by prescription. The United States is not a party to the action, nor interested in the result. It stands impartial by, and says we sold this land fifty-four years ago; we received payment in full for it, and have had no claim upon it for forty-five years.

We admit the validity of legal title derived from the United States; we do not ask that our possession of this

land, even though so long continued, even though we have in the confidence of our right expended large sums in its improvement, shall prevail against the grantee of the United States. We claim ourselves to be the grantee. The title of the United States was vested in us years before this defendant and Roger C. Weightman, in 1866, procured the paper which they call a grant, but which we say is mere waste paper.

The additional question, whether the bond for conveyance was transferred to Thomas Hughes, is a distinct and separate one. It depends, however, upon the same general principles of reasoning and conclusion from human probabilities, and of the competency of a jury to presume a fact not directly proven, when the facts actually proven tend to raise such a presumption.

The facts proven in this case do tend to prove that such a transfer was made, if not earlier, at least at the time when Hughes took the deed in fee of the seven feet six inches.

II.

As to the second error alleged, the evidence shows conclusively that at no time during the year 1866, nor for many years previous to that time, had Weightman had either seizin of the property or the enjoyment of any rents and profits of the land. By the statute of Henry VIII., therefore, the conveyance to the defendant on the —— day of October, 1866, was void.

IV.

The plaintiff was entitled to the benefit of the statute of limitations, and to the doctrines of adverse possession.

The United States claimed no interest in the property; had none whatever.

The act of Congress of May 7th, 1822, was a grant to the corporation of Washington of the whole estate. It gave the corporation power to sell and use the entire purchase

money for its own benefit, and to convey the fee absolutely under the seal of the corporation. The 5th section of the act providing that any residue should be paid into the treasury was practically useless, and legally without effect. The former sections had placed the entire proceeds of the land in the power and subjected it to the exclusive benefit of the corporation, without liability to account.

The court should have instructed the jury that the plaintiff was vested with title by virtue of the statute of limitations, and was entitled to their verdict.

The United States sold the property in 1822. In 1830 it was paid for and the purchaser entitled to a deed at any moment he chose to call for it. Suppose we admit that he waited until 1866. He could not thus prevent the operation of the statute of limitations. The deed of 1866 related back to the sale and payment of purchase money, and took effect from the 5th of June, 1830.

WM. A. MELOY,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 169.

DOE EX DEM OAKSMITH *vs.* HORACE S. JOHNSON.

On Error from the Supreme Court of the District of Columbia.

BRIEF OF THE DEFENDANT.

The plaintiff sued to recover the south half of lot 14 in in reservation B, fronting on Sixth street, below the Avenue, in the city of Washington.

The title to this land was in the United States absolutely, by the conveyances of the original proprietors.

Van Ness *et al. vs.* Washington and the United States, 4th Peters, 232, 9th Curt., 62.

Little trouble will be found in following the title.

By act of May 7, 1822, (3 Stat., 691,) Congress authorized the Corporation of Washington to improve the reservations, to lay them off into building lots, and on certain terms, to be prescribed by the corporation, sell and dispose of the right of the United States, &c.

The statute specifies that the proceeds shall be used in improvements, and requires a payment of any residue to the United States.

The Mayor was authorized to make deeds, &c.

By an ordinance of the Corporation of Washington, of May 22d, 1822, a board of commissioners was created, of

which the Mayor was chairman, armed with ample powers to carry into execution the purpose of the foregoing act of Congress.

Laws of the 19th Council of the city of Washington, page 75.

Both parties claim title to this land from the United States through the Mayor of Washington. (Record, p. 8.)

The plaintiff claims, and on the trial gave evidence tending to prove, that in September, 1822, one Henry T. Wakeman purchased said south half of lot 14 in trust for his brother, Roger C., of said commissioners, and took their bond for a conveyance, and that prior to 1830 Roger C. became the assignee of said bond, and paid the purchase money.

That Thomas Hughes, in 1828, was in full possession of, and improved the said land, and held the same to 1838, when he died, leaving it by will to his daughter Anna, lessor of plaintiff, who improved and held it till 1867 to the entry of defendant. That said bond for said conveyance was lost; and that in October, 1866, the defendant, with the said Roger, sole heir of Henry T., (then deceased,) the obligee of said bond, procured the Mayor of Washington to deed said land to said Roger C. (Rec., pp. 7 and 8.)

The defendant claims, and on the trial gave evidence tending to prove that in September, 1822, said Henry T. Wakeman purchased said land of said commissioners, and took a bond for its conveyance, and paid for the same in June, 1830. That in 1832 or 1833 he permitted the said Thomas Hughes to occupy the same as his tenant. That said Henry T. Wakeman died in 1853, and that in 1866 Roger C. Wakeman was his sole heir; and that on October 15 of that year the Mayor of Washington deeded said land to Roger C. Wakeman pursuant to said bond to Henry T. Wakeman, and that during the same month Roger C. Wakeman deeded the same to the defendant. (Rec., p. 8.)

All the questions in the case arise on the plaintiff's prayers for instructions to the jury, found in his bills of exceptions, pp. 7, 8, 9 and 10;

First. In substance the plaintiff asked the Court to say to the jury that there was evidence from which they could find that the purchase of Henry T. Wakeman was in trust for Roger C. Wakeman, or that Roger C. Wakeman became the assignee of said bond prior to March, 1837, and that if they so found it was competent for them also to find that such bond was assigned to Thomas Hughes, in his life time, and also that the Mayor conveyed said land to said Hughes, or his devisee, and the plaintiff can recover.

Second. If the jury find that said Hughes, for a period prior to his death, in 1837, was in possession of said land, and that his devisee, Anna, continued in possession till 1867, that the deed of Roger C. Wakeman to the defendant was void.

Third. If the jury find that Henry T. Wakeman purchased in trust for Roger C. Wakeman, or that Roger C. Wakeman became his assignee, and that Roger C. Wakeman tried to get a deed of said land in 1830 and failed, and that in March of that year he sold and conveyed to Thomas Hughes a contiguous portion of property, to wit, the north part of lot 13, of which he, Roger C. Wakeman, had procured a deed; then it is proper for the jury to infer that said Thomas Hughes had procured an assignment of the bond to Henry T. Wakeman for said south half of lot 14; and if the jury further find that said south half of lot 14 was paid for before the 5th of June, 1830, and that Thomas Hughes died seized of said land, and devised the same to the plaintiff's lessor, who remained in possession till the

entry of the defendant and erected a brick building on it in 1849, the jury may then presume that the Mayor conveyed said south half of lot 14 to those under whom the plaintiff claims.

Fourth. If the jury find that the plaintiff and those under whom he claims were in possession more than 20 years, claiming title, then he is entitled to a verdict.

Fifth. If the jury find that Thomas Hughes went into possession of the land under Henry T. Wakeman, and that he devised the same in 1837, and that the devisee, under said will, continued in possession for more than twenty years before the entry of the defendant, claiming title, said possession by said devisee was adverse, and entitled the plaintiff to recover.

Sixth. If the jury find that said land was sold to Henry T. Wakeman in 1822, and paid for in 1830, and That Thomas Hughes was in possession several years before his death in 1837; and that his devisee has for herself, been in possession, claiming title till the entry of the defendant in 1867, they may presume a conveyance from the Mayor to Henry T. Wakeman, and from him to those under whom the plaintiff claims.

These propositions, severally, were refused by the court, and this ruling by the circuit court was confirmed by the court in general term.

This ruling of the court below is the error complained of here.

These prayers were each submitted, and rejected as a whole.

I. The first and third, when the foreign matter is set free from each, are the same,

They are predicated of several important assumptions, wholly without support from the evidence given on the trial. There was no evidence tending to prove an assignment from Roger C. Wakeman to Hughes, and none that the Mayor conveyed the land to Hughes, or his devisee. In each of these lapse of time, as a ground from which to infer a grant, is carefully excluded.

The court was asked to tell the jury that they could infer a grant from facts that did not tend to prove one.

A grant must be proved or presumed.

An actual grant can only be proved like any other fact, by competent, relevant, sufficient evidence.

It can be presumed only from the prescribed possession.

Clearly these prayers were properly rejected.

II. The remaining propositions in various forms rest upon prescription. Twenty years adverse possession, claiming title.

Clearly, as I have shown, the title to the land was in the United States, and must have so remained, until, pursuant to the conditions prescribed by the Corporation of Washington, the Mayor should convey it to a purchaser. The act of March 7, 1822, did not vest the title in Washington city. The Mayor was authorized to convey "the right of the United States," which was repeated.

It is believed that in all cases of the grant of lands under the present Government, a deed or patent has always passed the title.

In this instance Congress and the President united in a power of attorney, constituting the Mayor of Washington, attorney in fact to convey the land, and he did convey it on the 15th of October, 1866, to the defendant's grantor.

Prescription cannot prevail against the United States.

Lindsey *et al. vs.* Lessee of Miller, 6 Peters, 666,

10 Curt., 304, and numerous cases,

Possession of public land cannot prevail against the grantee of the United States.

Burgess *vs.* Gray *et al.*, 16 How., 48; 20 Curt., 25.

Legal title, derived from the United States, prevails against all equities and prescriptions.

Gibson *vs.* Choteau, 13 Wall., 92.

Clearly the judgment of the court below must be affirmed.

A. G. RIDDLE,
For Defendant.

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